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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	**CC Docket No. 96-128**
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	

PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, WAIVER

The Independent Telephone Companies identified in Attachment A (the "Independents"),[1] hereby file this "Petition for Clarification or, in the Alternative, Waiver" of the "ILEC" default payphone compensation percentage stated in 47 C.F.R. §§ 64.1301(a), (d), and (e) (the "Default Compensation Rules") adopted by the Federal Communications Commission (the "Commission" or "FCC") in its "Fifth Order on Reconsideration and Order on Remand"(the "*Fifth Recon Order*") in the above-captioned proceeding.[2] Specifically, the Independents request that the Commission clarify that where the Independent is solely a local service and exchange access provider and provides no end user service to payphone users who place Compensable Calls,[3] no obligation is imposed upon the Independent under the Default Compensation Rules.

As discussed below, the Independents operate subject to state regulation or policies that establish a connecting carrier as the service provider of intraLATA interexchange and toll

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1 Attached hereto are the declarations of each of the Independents. These declarations attest to the relevant facts supporting this request for clarification or, in the alternative, waiver of the Default Compensation Rules. Because the relevant facts are substantially similar for each Independent, this consolidated Petition has been filed. Counsel will submit the original of the declarations when received

2 *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Fifth Order on Reconsideration and Order on Remand*, CC Docket No. 96-128, 17 FCC Rcd 21274 (2002)("*Fifth Recon Order*").

3 The FCC's Default Compensation Rules are aimed at providing compensation to Payphone Service Providers ("PSPs") for access code and subscriber toll-free calls originated

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services. Unlike the Bell Operating Companies ("BOCs") and other local exchange carriers ("LECs") that may also provide LATA-wide services on a compensable basis, and thereby may provide such services to end users utilizing a payphone in their service areas, the Independents do not provide any such services. Accordingly, the Independents respectfully submit that clarification is appropriate to ensure that payphone providers obtain their default compensation from the carriers that actually are in a position to provide service associated with Compensable Calls made by customers using payphones in the Independents' service areas. Absent this clarification, the Independents request that they be granted a waiver of the Default Compensation Rules.

As emphasized below, this Petition does not challenge the right of PSPs to seek compensation under the Default Compensation Rules from Interexchange Carriers ("IXCs") or those LECs that may offer their own Compensable Call services to end users from a payphone. Rather, the requested relief seeks to ensure that the responsibility and obligation for payment is placed upon the entity that the FCC has identified as the "primary economic beneficiary"[4] of such Compensable Calls

I. Background and Summary of Request for Relief

This request for clarification or, in the alternative, waiver arises because each of the Independents has received an August 29, 2003 request made by APCC Services, Inc. ("APCC") on behalf of various PSPs for compensation under the FCC's Default Compensation Rules. The

from their payphones. *See, e.g, id* at 21279(¶16); *see also id.* at 21276 (¶3 and n.7). As used herein, these calls are referred to as "Compensable Calls."

4 *Id* at 21276 (¶3).

APCC request was premised upon the FCC' s decision in the *Fifth Recon Order*.[5] Although each of the Independents is an incumbent local exchange carrier ("ILEC"),[6] the facts demonstrate that the Compensable Calls to which the APCC invoice applies are the responsibility of a connecting LEC or intraLATA toll carrier in a manner consistent with state regulatory requirements. With respect to these calls, the Independent provides only exchange access service[7] to the carrier that receives compensation from the customer making the Compensable Call.

Accordingly, clarification of the application of the Default Compensation Rules to each of the Independents is necessary to ensure that the "primary economic beneficiary" of a Compensable Call is properly assessed the ILEC rate of 2.19% included within the Default Compensation Rules (the "ILEC Default Rate"). Absent this relief, the ILEC Default Rate will improperly be applied to each Independent, thereby frustrating the FCC's stated purposes of the governing statutory section (47 U.S.C. §276) and the underlying policies upon which the Commission based its Default Compensation Rules. For the reasons stated herein, the ILEC Default Rate should be assessed to the Regional Bell Operating Company ("RBOC") LEC (*i.e.*, the BOC)[8] or any other ILEC that, pursuant to state regulation, operates as an intrastate

5 Out of an abundance of caution and without waiving the inapplicability of the ninety (90) day period, this filing is being made within 90 days established for entities mistakenly listed as "carriers" in the Default Compensation Rules. *See id* at 21291 (n.89). While clearly "carriers" as that term is commonly understood, the Independents do not, as explained herein, otherwise receive end user compensation associated with Compensable Calls that would trigger the obligations for payment under the Default Compensation Rules.

6 *See* 47 U.S.C. §251(h).

7 *See* 47 U.S.C. §153(16).

8 For purposes of this Petition, the Independents utilize the term "RBOC" to also refer to the BOCs *See* 47 U.S.C §153(4).

telephone toll provider in the areas where each of the Independents provides only local exchange and access service.

In the absence of the requested clarification, each of the Independents alternatively requests waiver of the Default Compensation Rules. Absent waiver, the application to the Independents of the Default Compensation Rules, and in particular the ILEC Default Rate, would inequitably place the burden of payment of the ILEC Default Rate upon the Independent. The imposition of the ILEC Default rate upon the Independent in these circumstances is contrary to both the public interest and the "primary economic beneficiary" rationale provided by the FCC in support of its Default Compensation Rules. Accordingly, waiver of the application of the Default Compensation Rules to the Independents is proper and appropriate in these circumstances. In the absence of waiver, the very purpose of the underlying rule will not be achieved. The beneficiary of the Compensable Call will not be assessed the appropriate default compensation.[9]

II. The Independents are Exchange Access Providers; The Independents do not Provide Compensable Call Services to Users of the Payphone

As reflected in the attachments hereto, each of the Independents is an exchange access provider within its ILEC service areas. When Compensable Calls are placed at payphones located within the Independent service areas, it is the toll provider associated with the access code or the 800 number dialed by the payphone customer that is responsible for these calls. The automatic routing of these calls by the Independents is triggered by an end user dialing a "1" as

9 Waiver of a Commission rule is appropriate where (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest, or (2) unique facts or circumstances render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there

part of the dialing process required for a Compensable Call, even where the call is ultimately terminated to an end user located within the Independent service area. Once a Compensable Call is made and routed by the Independent as directed by the intraLATA provider, that provider controls the routing of the call, how that call will be terminated, and how much the customer will pay for the Compensable Call.

In each of the Compensable Call scenarios identified by the FCC, the role of the Independent is limited to that of an exchange access provider; the Independent does not receive any compensation from the end user placing the Compensable Call from the payphone. Rather, the end user compensation goes to the interLATA or intraLATA provider carrying the call. The Commission correctly understood that the BOCs serve as the intraLATA provider in their own service areas. The Commission may not have been aware that in many states, including those where the Independents serve, the BOC also provides the intraLATA services within the Independent's service area pursuant to the existing regulatory framework. Unlike the BOCs, the Independents are not intraLATA service providers.

Accordingly, when interLATA or intraLATA interexchange calls are made from any payphone in an Independent's service area, it is not possible for the Independent to handle a Compensable Call. Unlike the BOCs or other LECs that provide intraLATA services on a compensable basis, the Independents provide only originating access service to other carriers. With respect to the traffic associated with the invoice received from APCC, therefore, the Compensable Calls were handled by an intraLATA toll provider, not by the Independents.

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is no reasonable alternative. *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

III. Clarification of the Application of the Default Compensation Rules to the Independents Serves the Public Interest

In the *Fifth Recon Order,* the Commission prescribed rules that implemented Section 276 of the Communications Act of 1934, as amended. As the FCC has explained, "Section 276 requires us to ensure that per-call compensation is fair, which implies fairness on both sides."[10] In pursuit of this objective, the Commission established the ILEC Default Rate at 2.19% of the total amount of compensation due a PSP on Compensable Calls, and applied that percentage to "both RBOC and non-RBOC incumbent LECs" alike.[11] This ruling, however, was based on the prior finding that "LECs must pay payphone compensation to the extent that they handle compensable payphone calls,"[12] which, according to the Commission, could occur in two ways:

> The first instance is when a LEC terminates a compensable call that is both originated within its own service territory and not routed to another carrier for completion. The second instance is when a LEC also provides interexchange service and carries the call as would any other IXC.[13]

It is also clear that the ILEC Default Rate was established based on data from the RBOCs. Each of the BOCs is, in fact, an intraLATA provider of calls "originated within its own service territory and not routed to another carrier for completion."[14] In the States where the Independents operate, the BOC is also, in the case of each Independent, considered the compensated service provider for intraLATA traffic dialed on a 1+ basis irrespective of whether

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10 *Fifth Recon Order,* 17 FCC Rcd at 21302 (¶82).

11 *Id.* at 21292 (¶56).

12 Id. at 21291 (¶55) citing In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, CC Docket No. 92-128, 11 FCC Rcd 20541 (1996)("First Report and Order") at 20584 n.293 and Fourth Order on Reconsideration and Order on Remand, 17 FCC Rcd 2020, 2026-2027 (2002).

13 *Id* at 21291 (¶55).

14 *Id.* at 21292 (¶56).

the call begins and terminates on the network of the Independent. Pursuant to the existing state regulatory requirements with respect to such calls, the BOC establishes the charges for this service and receives the end user compensation; the Independent charges access to the BOC, but receives no end user compensation which is the very trigger of carrier compensation responsibility contemplated by the Commission's Default Compensation Rules.

> For purposes of paying compensation for compensable calls. . . , we note that the term "IXC" includes a LEC when it *provides interstate, intraLATA toll service.* Currently, because LECs are not the primary carrier for subscriber 800 calls, the *relevant toll calls for which LECs will [be] obligated to pay compensation are those that are made with use of a LEC-specific access code.* As LECs (both incumbent and non-incumbent) *begin to carry additional toll calls originated by* payphones, they will be required to pay per-call compensation on those calls.[15]

In light of these directives, the Independents submit that the only plausible interpretation of the reference in paragraph 56 in the *Fifth Recon Order* to "non-RBOC incumbent LECs" is to those "non-RBOC incumbent LECs" that provide Compensable Call services in the same manner that the RBOCs provide services, including intraLATA Compensable Calls dialed on a 1+ basis. Because the Independents do not provide Compensable Call services to customers utilizing payphones in their service areas, the Independents correctly assumed that the Commission's requirements would only apply to those LECs that provide Compensable Call services.

The Independents recognize that in the event the regulatory requirements of their respective states change, as generally proposed by the RBOCs, the responsibility for the assessment could be applicable to them if they become responsible for the provision of 1+ dialed calls. Unless and until the state regulatory requirements are changed, however, the Independents did not expect a payphone provider to direct a default assessment to them; nor did the

[15] *First Report and Order,* 11 FCC Rcd at 20584 n.293 (emphasis added).

Independents identify reason to challenge the Commission's Default Compensation Rules. The Commission's intent is clear. recipients of compensation for Compensable Calls to customers using pay phones should pay the assessment. The Independents, however, did not contemplate that confusion or misunderstanding would lead to the misdirection of an assessment to them.

Accordingly, clarification is necessary to confirm this understanding with respect to the ILEC Default Rate: **Where the Independent is solely a local service and exchange access provider and provides no Compensable Call services to end user using payphones in its service area, no obligation is imposed upon the Independent under the Default Compensation Rules. Under these circumstances, the 2.19% compensation assessment (*i.e.*, the ILEC Default Rate) should be directed to the connecting BOC or other connecting LEC that receives compensation for 1+ dialed intraLATA calls originating in the Independent's service area.** As the facts demonstrate, this requested clarification identifies and distinguishes the service functions that each of the Independents performs with respect to Compensable Calls. The application of this clarification also ensures compliance with the Commission's directives that the compensation arrangement reflect the "primary economic beneficiary" associated with the Compensable Call and that such arrangements be equitable.

The Independents recognize that the requested clarification may raise concerns regarding potential under-compensation to various PSPs located within the Independents' respective service areas. That concern can properly be addressed by applying the ILEC Default Rate to the BOC or other connecting LEC in each of the areas within which the Independents operate, consistent with the applicable intrastate regulation and resulting service arrangements. This result is not only consistent with the Commission's restatement of the RBOC Coalition's recognition that "there is 'no principled reason why the LECs should be excluded' from the obligation to pay compensation,"[16] but also ensures that the obligation under the ILEC Default Rate is applied to those entities that carry the Compensable Calls. Thus, the clarification that the Independents request does not and need not result in under-compensation for the PSPs operating within the Independents' service areas. The clarification will ensure that the 2.19% default assessment is properly assigned in accordance with the intent of the Commission.

IV. In the Alternative, Wavier of the Default Compensation Rules to the Independents Serves the Public Interest

In the event that the Commission does not grant the requested clarification, a waiver of the Default Compensation Rules for the Independents is necessary and appropriate, and consistent with the public interest.[17] The irrefutable facts <u>in the public domain</u> demonstrate that the underlying purpose of the Default Compensation Rules will not be achieved by the application of the ILEC Default Rate to the Independents. The Independents are simply not the recipients of end user compensation for any Compensable Calls initiated at a payphone in their service areas. Accordingly, placing payment obligations upon the Independents in these circumstances cannot be reconciled with the FCC's stated purposes for its Default Compensation Rules. Any contrary conclusion would otherwise disrupt the balance that the Commission sought to achieve in its Default Compensation Rules and inequitably place obligations upon the Independents where none should have been imposed. The inequity is exacerbated by the fact that application of the 2.19% assessment to the Independents improperly frees the carrier that receives end user compensation associated with Compensable Calls from the associated responsibility of payment to the payphone provider.

16 *Id* at 21292 (¶55) *citing* RBOC Coalition Comments at 34-35

17 *See WAIT Radio v FCC,* 418 F.2d 1153, 1159 (D.C. Cir. 1969); *see also* n.9, *supra.*

Under these circumstances, and in the absence of the above requested clarification, the public interest would not be served unless the application of the ILEC Default Rate to the Independents is waived and the attendant obligations under such rules are applied to the BOC or other connecting LEC that receives compensation for intraLATA calls originated in the Independent's service area pursuant to state regulation. This result not only ensures that PSPs are properly compensated, but also advances the fairness and "primary economic beneficiary" rationales underlying the Commission's Default Compensation Rules. Accordingly, the public interest would be served by a grant of this waiver to the Independents, including the remedial measure of applying the ILEC Default Rate to the BOC or connecting LEC as proposed herein.

V. Conclusion

For the reasons stated herein, the Independents submit that clarification of the Default Compensation Rules and application of the ILEC Default Rate is necessary and appropriate and entirely consistent with the FCC's *Fifth Recon Order* pronouncements. Alternatively, waiver of such rules in a manner consistent with that proposed herein should be granted. Accordingly, the Independents respectfully request that the Commission expeditiously grant this petition for clarification or, in the alternative, waiver.

Respectfully submitted,

The Independent Telephone Companies

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